

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOMERSET COMMUNICATIONS GROUP,
LLC, a Washington limited liability company,

Plaintiff,

vs.

WALL TO WALL ADVERTISING, INC., a
Delaware corporation; DONALD E.
MACCORD JR., and ANDREA MACCORD,
individually and as a marital community,
SHANNON DOYLE and TRACEY Z.
DOYLE, individually and as a marital
community; S.D. DOYLE, LTD., a Maryland
corporation; and FOURPOINTS HOLDING,
LLC, a Delaware limited liability company,

Defendants.

No. 2:13-cv-02084-JCC

DEFENDANTS' MOTIONS IN LIMINE

**NOTE ON MOTION CALENDAR:
JANUARY 11, 2016**

**TRIAL SCHEDULED:
MONDAY, JANUARY 11, 2016**

DEFENDANTS' MOTIONS IN LIMINE
No. 2:13-cv-02084-JCC

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MOTION IN LIMINE NO. 1

Motion to exclude any evidence or mention of the unproven allegations in prior lawsuits

Defendants request an order excluding any evidence, testimony, or mention of the allegations and claims made against Donald MacCord or Shannon Doyle or their companies in prior lawsuits. Plaintiffs will likely seek to elicit testimony and otherwise present evidence of the allegations made against Defendants in a 2010 lawsuit brought by certain of the owners of Fourpoints. Those claims, which concerned allegations regarding misuse of company resources, were never proven and were dismissed with prejudice pursuant to a settlement agreement whereby Plaintiffs agreed to accept a nominal sum. Such allegations are not relevant or probative to any of the claims or defenses in this case and in fact would be highly prejudicial and confusing to the jury.

Defendants acknowledge that certain aspects of the prior lawsuit may come into evidence. For example, prior declarations of the Defendants may come into evidence and Defendants will need to address these declarations. However, any such references to the prior lawsuit should not include mention of the unproven allegations or claims of the lawsuit. The allegations of the prior lawsuit are not relevant to the issues in this matter and allowing evidence of such allegations risks a time-consuming and unnecessary mini-trial regarding claims not before the jury that Defendants will have to explain.

Federal Rule of Evidence 402 provides that irrelevant evidence is not admissible. Federal Rule of Evidence 404(b) states: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” In the Ninth Circuit, “[t]he appropriate test to determine admissibility under Rule 404(b) ... provides: (1) the other act evidence must tend to prove a material point; (2) the other act must not be too remote in time; (3) the evidence must

1 be sufficient to support a finding that the defendant committed the other act; and (4) in some
 2 cases, the other act must be similar to the offense charged.” *United States v. Bibo-Rodriguez*, 922
 3 F.2d 1398, 1400 (9th Cir.1991). “[E]ven if all four conditions are met, the evidence may still be
 4 excluded if under a Federal Rule of Evidence 403 analysis its probative value is substantially
 5 outweighed by the danger of unfair prejudice.” *Id.* at 1400-01.

6 Courts regularly exclude evidence regarding prior lawsuits. *See, e.g., Ward v. Estaleiro*
 7 *Itajai S/A*, 05-61821 CIV, 2008 WL 1749475, at *1 (S.D. Fla. Apr. 10, 2008) (excluding evidence
 8 of prior litigation, damages awarded, and attorney's fees incurred); *Turner v. Univ. of WA*, C05-
 9 1575RSL, 2007 WL 2984684, at *1 (W.D. Wash. Oct. 10, 2007) (excluding evidence of prior
 10 lawsuit); *John Hamatie, Monique Hamatie v. Louisville Ladder, Inc.*, 6:06-CV-817-ORL-18,
 11 2007 WL 7626033, at *1 (M.D. Fla. Oct. 24, 2007) (excluding evidence of prior claims and
 12 lawsuits).

13 Here, evidence regarding prior, unproven claims and allegations is simply not relevant to
 14 any of the claims or defenses in this matter, is highly prejudicial given the nature of the
 15 allegations in the prior lawsuit, is likely to confuse the jury, and risk an unnecessary mini-trial on
 16 claims not before the jury. Accordingly, such evidence should be excluded.

17 18 MOTION IN LIMINE NO. 2

19 Motion to exclude any evidence or mention of the tolling agreements

20 Defendants request an order excluding any evidence, testimony, or mention of the tolling
 21 agreements entered into by the parties. Between 2011 and 2013 the parties entered into multiple
 22 tolling agreements in an effort to come to an agreement that would resolve this dispute without
 23 resorting to litigation. These tolling agreements contain promises by Defendants to make
 24 payments as consideration for the tolling of the statute of limitations on Plaintiffs’ claims.
 25 Plaintiffs will likely attempt to introduce evidence of and elicit testimony regarding the tolling

1 agreements and the terms and conditions of the agreements. Such evidence should be excluded
2 under Federal Rules of Evidence 402, 403 and 408.

3 First, the tolling agreements are not relevant to any of the claims or defenses in this
4 matter. As mediator Jim Smith noted, this is a case that should be resolved by settlement (see Dkt
5 No. 85 and letter to the Court). Defendants have expended significant effort to reach a settlement
6 agreement short of trial. This effort includes participation in two mediations and the entry of
7 multiple tolling agreements. The tolling agreements were entered in an attempt to allow the
8 parties time to reach a settlement.

9 Plaintiff will likely attempt to use the tolling agreements, and their terms, to show that
10 Defendants are culpable. Plaintiffs should not be able to use the fact that Defendants tried to
11 settle this matter against Defendants. More importantly, the tolling agreements and their terms
12 are not part of this lawsuit. They are not relevant to any of the claims or defenses and they do not
13 tend to make any of Plaintiff's allegations more or less likely. Plaintiff is not suing on the tolling
14 agreements. They should be excluded under FRE 402.

15 Second, the tolling agreements are highly prejudicial in that they contain promises by
16 Defendants to make certain payments. Plaintiffs will claim that such promises are indicative of
17 culpability. But there is no connection (and therefore no probative value) between the terms of
18 the tolling agreement and the merits of Plaintiffs' claims. The tolling agreements were contracts
19 solely designed to preserve the parties' rights with respect to any claims while they attempted to
20 reach settlement. They were not negotiated or designed to reflect the merits of any claims that
21 Plaintiffs may have had. And they should not be presented as evidence in support of such claims.
22 The tolling agreements should be excluded from evidence under FRE 403.

23 Finally, the tolling agreements should be excluded under FRE 408 because they are offers
24 of consideration in compromising or attempting to compromise the claim. FRE 408(a)(1). The
25 policies behind the exclusion of FRE 408 evidence are applicable here. First, as noted above, any

evidence in the tolling agreements is “irrelevant since the offer may be motivated by a desire for peace rather than from any concession of weakness or position.” FRE 408 Advisory Committee Note. Second, public policy favors the “compromise and settlement of disputes.” *Id.* Allowing a party to use an attempt at an offer of compromise against his or her opponent, ignores this public policy and, in fact, may cause parties to re-think offers of compromise if they can be used against them in court.

For all of the above reasons, any evidence, testimony, or mention of the tolling agreements entered into by the parties should be excluded.

MOTION IN LIMINE NO. 3

Motion to exclude any evidence related to the fact that MacCord drove a Bentley

Defendants request an order excluding any evidence, testimony, or mention of the fact that Donald MacCord leased and drove a Bentley automobile during and after his work as CEO of Fourpoints Communications. In the depositions of Mr. MacCord and Mr. Doyle, Plaintiffs sought to elicit testimony regarding Mr. MacCord’s use of the Bentley while he was employed by Fourpoints to show that Mr. MacCord misused Fourpoints corporate resources and to attempt to show that Mr. MacCord used Somerset funds to pay for the lease of the Bentley and other automobiles. The truth is that Fourpoints paid for the lease of the Bentley with full knowledge while Mr. MacCord was employed as CEO. The Bentley was important to Mr. MacCord’s sales relationships with Native American tribes. Following Mr. MacCord’s departure, Mr. MacCord returned the Bentley to the dealership. At no point did Mr. MacCord or Mr. Doyle use Somerset’s investment funds to pay for the leases of the Bentley or any other automobiles that were paid for by Fourpoints for Mr. MacCord’s use. There is no evidence that the use of or payment for the Bentley or any other automobile provided by Fourpoints is in any way related to the securities fraud allegations in this litigation.

At trial, Plaintiffs will likely seek to present testimony regarding the fact that Mr. MacCord drove a Bentley. Such evidence is irrelevant under Federal Rule of Evidence 402. The fact that Mr. MacCord drove a Bentley or other automobiles that were paid for by Fourpoints is not relevant to any of the claims or defenses at issue in this litigation and does not tend to prove or disprove any fact that will be material at trial. Such evidence is also highly prejudicial under FRE 403. Jurors may react negatively to the fact that one of the Defendants drove a Bentley as part of his work. Such a reaction is liable to color the jurors' impression of Mr. MacCord and inhibit the jurors' ability to evaluate the available evidence in an impartial manner. Because it bears no relevance to the issues in this litigation and because it is prejudicial, any evidence, testimony, or mention of the fact that Mr. MacCord leased and drove a Bentley should be excluded.

DATED this 4th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys of record for Defendants Wall To Wall Advertising, Inc.; Donald E. MacCord Jr. and Andrea MacCord, Individually and as a Marital Community, Shannon Doyle and Tracey Z. Doyle, Individually and as a Marital Community; and S.D. Doyle, LTD.

2. I hereby certify that I filed the foregoing document through the Court's ECF service which will send notification of filing to the following:

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Attorneys for Plaintiff

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 4th day of January, 2016 at Seattle, Washington.

s/ Lauren Beers

Lauren Beers